SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. KLAUSNER
RAY R. MURDOCK
CLYDE C. HOUSTON
Attorneys for Petitioners

1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

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No.

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled matter on January 23, 1974.

I

REFERENCE TO REPORTED DECISION BELOW

The decision below (not yet officially reported) appears in 490 F.2d 921 (Ct. Cl. 1974). A copy of the decision is appended to the present petition.

II

REASONS FOR JURISDICTION

The decision below, dismissing the petition of plaintiffs, petitioners herein, was rendered January 23, 1974.

The reasons for the jurisdiction of the Supreme Court to review on certiorari the instant judgment of the Court of Claims under 28 U.S.C. § 1255 and Rule 19.2 are: (1) that the Court of Claims has decided important questions of federal law which have not been but should be settled by the Supreme Court, namely, the correct construction in several major respects of a federal overtime statute in relation to the work of operating employees of the Alaska Railroad; and (2) that the Court of Claims has decided a federal question in a way in conflict with applicable decisions of the Supreme Court, namely, by construing the said statute as allowing the railroad to employ an artificial formula rather than actual hourly earnings, which were substantially greater, in determining the basic rate in overtime calculations required by the said statute.

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether in calculating overtime under a federal statute specifying overtime at not less than one and one-half times the basic hourly rate of pay, the employer may fix such basic hourly rate by a contract formula substantially below actual hourly earnings, thereby producing far lower overtime pay than would the real earnings.

2. Whether, where the Court of Claims has previously held that certain special payments to railroad employees (called arbitraries) for extra work not

otherwise compensated, onerous work, stranding or detention away from home, deadheading, and the like, should not be set off against overtime pay otherwise due under the statute, the employer may so set them off pursuant to contract.

3. Whether, where the statute grants overtime pay for overtime work in excess of 8 hours a day or 40 hours a week, the railroad may by contract limit its payment to the greater of the daily or weekly overtime, instead of paying overtime for hours exceeding 8 in a day during the first 40 consecutive hours, and for all subsequent hours exceeding 40.

4. Whether, where the statute prescribes overtime pay for hours of duty in excess of 40 a week during standby or on-call status, extra-board employees of the railroad are entitled to such overtime pay when they are required, against a stated guaranty, to be on 1½ hours call 24 hours a day, 7 days a week, with no rest day.

IV

STATUTE INVOLVED

§ 23 (Proviso clause), 48 Stat. 522 (1934), 5 U.S.C. [1954 Ed.] § 673c, as amended by § 201, 76 Stat. 360 (1962), 5 U.S.C. § 5544:

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who

regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service.

(b) An employee under the Office of the Architect of the Capitol who is paid on a daily or hourly basis and who is not subject to chapter 51 and subchapter III of chapter 53 of this title is entitled to overtime pay for overtime work in accordance with subsection (a) of this section. The overtime hourly rate of pay is computed in accordance with subsection (a) (1) of this section. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 486; Pub.L. 90-83, § 1(26) (A), Sept. 11, 1967, 81 Stat. 200.

As amended in 1972, § 5, 86 Stat. 573, 5 U.S.C. [1974 pocket] § 5544, the words "basic rate of" were eliminated from line 1 of the text as given above. This amendment, as well as insertion of an additional class of subject persons, does not appear to affect the issues.

V

STATEMENT OF THE CASE

Petitioners are employees of the Alaska Railroad, which is the property of the United States, and is managed at present by the Secretary of Transportation. They have been assigned to a so-called extra board, which requires them to stand by for work calls 24 hours a day, 7 days a week, with no rest days. Their petition to the Court of Claims raised questions concerning overtime properly payable to them pursuant to § 23, 48 Stat. 522 (1934), 5 U.S.C. [1934 Ed.] § 673c, as amended by § 201, 76 Stat. 360, (1962), 5 U.S.C. § 5544 [hereafter § 5544]. They complained that by administrative order and contract, the railroad has unlawfully deprived them of material amounts of overtime pay due them.

A. DESCRIPTION OF THE DUAL SYSTEM.

The pay system effective on the Alaska Railroad, known as the dual system, has the following features relevant to the proceeding:

1. Miles Versus Hours.

The dual system offers operating personnel payment either by hours worked or miles run in the day or week, whichever is greater. The historical basis reverts to a time when trains averaged 12½ miles per hour, or 100 miles in an 8-hour day, with the rate of

pay stated in cents per mile.[1] In that case, pay would be identical whether stated in hours worked or miles traversed: (1) 100 miles x 30¢ per mile = $30.00 a day; (2) 30¢ x 12½ = $3.75 an hour x 8 hours = $30.00 a day. If the train actually took 6 hours to cover 100 miles, pay on a time basis would be 6 x $3.75 = $22.50; here the dual system would allow payment on the basis of distance covered, or $30.00. If the train took 10 hours, payment on a time basis would be 10 x $3.75 = $37.50, as compared with the mileage pay, which remains $30.00; here the dual system would allow payment on the time basis. In practice, higher modern train speeds in almost all instances dictate that miles will yield the higher pay even in the difficult conditions experienced in Alaska. This is certainly true of distances more than 100 miles, and although time theoretically controls lesser distances, because of minimum guaranties, the number of such runs in the illustrative record before the Court of Claims was negligible. The average road trip was 226 miles, and the average train speed nearly 20 miles an hour.

2. Straight Time, Overtime and Arbitraries.

a. Real and Conventional Mileage.

Predominance of actual speed greatly exceeding 12½ miles per hour not merely causes mileage to become the regular basis of payment, but throws the

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[1] From the reports of earlier litigation, it appears that it had been the practice, for payroll calculation, to convert miles to payable hours in the ratio of 12½ miles to the hour. At present it is the practice to pay on the mileage basis. This is followed even where distance is not involved. Thus yard pay, which is based solely on time and is no way related to distance, is nominally expressed in terms of miles, with a rate per mile multiplied by a fixed ratio of 12½ miles per hour.

nominal time formula, based on 12½ miles an hour, out of congruence with true average earnings from road work. The real average experience in the record was 60% greater than the conventional mileage represented in the contract formula.

b. Overtime.

The dual system has provision for two alternative forms of overtime pay, weekly and daily. The former applies to yard work and to mixed yard and road work; the latter is applicable only to road work.

Overtime in yard service is allowed at one and one-half times for hours exceeding 40. For mixed service, actual hours worked (including deadheading) are compiled, and separately actual miles run each day (but including at least 100 miles for each day on which actual miles are less than that number, each day in yard service, and each day on annual or sick leave); overtime is allowed at time and one-half (but only straight time for passenger service) for each hour exceeding the quotient for miles so credited divided by 12½, provided at least 40 hours have been worked.

It is observable that under this formula the more miles run the less likely is overtime to be earned; however, the employee retains, albeit at straight time, his full pay for actual miles— and, strikingly, the allowances for non-working time, which the railroad declined to incorporate in the base for calculating statutory overtime.

The alternative daily method of computing dual-system overtime for road work is to pay time and one-half (straight time for passenger service) for overtime, which begins (1) on runs of 100 miles or less,

after 8 hours, and (2) on runs over 100 miles, after time on duty exceeds the quotient of miles run divided by 12½. In the latter case again, the longer the run the less likely is overtime to be earned. In the illustrative record before the Court of Claims, the principal road runs were Anchorage-Healy, 244 miles; Anchorage-Fairbanks, 356 miles; and Anchorage-Seward (round trip), 228 miles. Overtime could accrue under the rule only after 28 hours, 20 hours and 18 hours, respectively. The longest elapsed time for any one of these runs was about 16 hours, which was also the legal limit for hours in a single day. Even on shorter runs where overtime is arithmetically possible, it necessarily begins well after 8 hours. A frequent run in the record was Anchorage-Whittier, about 125 miles, for which overtime commences only after 10 hours under the rule (125 miles divided by 12½ = 10 hours).

Of the 321 hours that the particular plaintiff whose record was before the Court of Claims worked in excess of 8 hours a day on 58 round road trips during the test year the railroad recognized only 44 hours as dual-system overtime, or 15%.

Not merely does overtime accrue inversely to distance under the dual system, but the rate of straight-time pay actually diminishes with distance. Road pay consists of a basic rate for the first 100 miles in a run, and a "mileage" rate for miles in excess of 100 less by 13% on average than the basic rate.

c. Arbitraries.

The dual system provides additional compensation in a number of circumstances similar, allowing for the

railroad mystique, to those obtaining in other industries. The term for these allowances is "arbitraries". They classify into allowances (1) for especially difficult or onerous work (e.g. multiple-unit pay for extra locomotives and cars); (2) for work outside defined job duty (switching or train preparation by road crew, or road service by yard crew); (3) for preempting what would otherwise be free time or legally required rest time (by assigning work, by stranding or detention at distant points, or various forms of delay in operation); and (4) for failure to provide expected work ("run-around" scheduled man, or failure to use a man called for duty). Some of these arbitraries are for non-working time, but many others represent payments for actual work, whether in time already compensated or in time not otherwise compensated.

The arbitraries constitute a significant factor in the illustrative record before the Court of Claims, representing about 16% of total pay.

3. Extra Board.

The railroad maintains stand-by crews on "extra boards" whose function is to act as substitute or additional crew in all branches of train work. The principal features of the extra board are (1) the men listed are on 1½-hours notice to report 24 hours a day, 7 days a week with no rest day; (2) against their guaranteed pay of not less than 1200 miles per two-week pay period at freight-service rate is set off, by way of penalty, time lost at the rate of 100 miles a day, while missing a call also entails being held off the board for 24 hours, and returning at the foot of the list; (3) also set off against this guaranty is all pay from assigned work, including arbitraries, straight time and overtime.

B. RELATION OF § 5544 TO DUAL SYSTEM.

In a series of cases culminating in Samples v. United States, 135 Ct. Cl. 548 (1956), the Court of Claims determined that the forerunner of the present §5544 (§ 23, Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. [1954 Ed.] § 673c) applied both to operating and non-operating employees of the Alaska Railroad, and entitled them, in its then form, to overtime pay for hours exceeding 40 a week. In order to preserve the dual system, the Court said that since the overtime statute is based on hours worked, pay on a time basis with overtime at the rate of 150% should be compared with earnings from mileage under the dual system, and the greater of the two awarded. It also held that arbitraries should not be included in the base rate, but equally that, except for any themselves in the nature of overtime, they should not be set off against statutory overtime. In the judgment, therefore, arbitraries were included by the Court on both sides of the comparison between dual-system earnings and statutory overtime.

C. NATURE OF PETITIONERS' COMPLAINT BELOW.

In the present litigation, petitioners complained that pursuant to certain illegal contractual practices, the railroad has contrived to avoid substantially all payment of statutory overtime. These practices petitioners described as follows:

1. The Contract Formula Establishing the Basic Rate Is Far Below Actual Hourly Earnings.

In calculating statutory overtime for road work, the railroad has determined the "basic rate" by an artificial formula that reflects only 65% of actual hourly earnings. This formula gives employees credit for

only 12½ miles in the hour, whereas according to the illustrative record before the Court the actual average road experience was nearly 20 miles an hour. In dollars, allowing for different rates per mile for different classes of work in the case given, this meant that the railroad was employing a base rate for overtime of about $3.77 an hour, against actual earnings of about $5.77, and a corresponding overtime rate only 65% of what such actual earnings required.

2. Arbitraries Have Been Set Off Against Statutory Overtime.

Notwithstanding the ruling in Samples that arbitrary payments, although not to be included in the base rate, should not be set off against statutory overtime, the railroad has consistently since then followed the practice of paying arbitraries only under the dual system, and has refused to pay them if, and only if, statutory overtime were payable. It was admitted below that this had the effect of setting off the arbitraries against such overtime.

3. Only the Greater of Weekly or Daily Overtime Is Deemed Payable.

The railroad has also followed the contractual practice of calculating statutory overtime payment on the basis of daily or weekly overtime, "whichever is greater". This means in effect that it guarantees itself five 8-hour days at straight-time wages in weeks extending five days or more, although it frequently exacts 40 hours in fewer than five days.

4. No Overtime Is Paid for Stand-by Exceeding 40 Hours.

Finally, the railroad has refused to pay extraboard employees overtime in accordance with § 5544 for

standing by in excess of 40 hours per week (less the statutory exception for eating and sleeping time).

D. THE DECISION BELOW RESOLVED ALL ISSUES AGAINST PETITIONERS.

Following cross motions for summary judgment, the Court of Claims on January 23, 1974 granted the railroad's motion, and dismissed the petition.

(1) The Court held, with respect to the overtime formula, that the statutory language is not "compelling" that the contract basic rate must reflect real earnings, Appendix at 7, 490 F.2d 921, 925, and that so to require "plausibly" might "destroy the dual system beyond the possibility of preservation." App. at 5, 490 F.2d at 923. (2) With respect to the set-off of arbitraries against statutory overtime, the Court held that an employer bound by statute to pay overtime may "recompense himself by curtailing benefits in other areas not prescribed by statute." App. at 9, 490 F.2d at 926. (3) As to pay for daily and weekly overtime, the Court sustained the defendant's practice of paying the greater of them on the ground that to give effect to both would produce "absurd and whimsical results". App. at 12, 490 F.2d at 928. (4) Finally, the Court denied petitioners any overtime for excess standby time on the grounds that "they are not paid to wait", and that their waiting time does not represent working time. App. at 10, 490 F.2d at 927.

VI

ARGUMENT

A. THE STATUTE REQUIRES THE BASIC RATE TO REFLECT ACTUAL HOURLY EARNINGS.

In actual experience, drawn from the illustrative record, the dual system yielded average earnings of $5.77 an hour for road work. The artificial contract formula would have amounted to $3.77 an hour (12½ multiplied by roughly 30 cents a mile).

Under all the decisions construing the statutes of this class, it is settled that the actual hourly earnings constitute the basis for calculating overtime, and that a contractual formula cannot be given effect if it does not represent actual earnings. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216 (1942); Walling v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11 (1944); United States v. Rosenwasser, 323 U.S. 360, 65 S. Ct. 295 (1945); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945); Walling v. Harnischfeger, 325 U.S. 427, 65 S. Ct. 1246 (1945); 149 Madison Ave Corp. v. Asselta, 331 U.S. 199, 67 S.Ct. 1178 (1947).

The Court of Claims rejected the principle that actual hourly earnings must control the overtime calculation in the case of road employees of the Alaskan Railroad. The opinion advances several different reasons for this result, some of which it seems itself to doubt, although reflecting their influence.

1. This Court's Decisions Require That Overtime Be Based on Actual Hourly Earnings.

The opinion cites decisions of this Court holding "that a bargained regular rate of pay must yield

before a calculation of actual earnings per hour worked". Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580, 62 S.Ct. 1216, 1221 (1942); Walling v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11 (1944); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945). It notes that Youngerman-Reynolds required piece-work rates actually paid to prevail over a nominal contract rate.

The Court of Claims then goes on to mention Walling v. Belo Corp., 316 U.S. 624, 62 S.Ct. 1223 (1942), although it is unclear to what extent it considers that decision controlling. On its face, the present case is not a Belo situation at all. The rates actually paid here are not a fixed weekly or even daily salary alleged to comprise in one sum the true basic rate and a lawful overtime for a stated number of overtime hours (54 hours in Belo, and now 60 hours under § 203(e), F.L.S.A.), after which the contract overtime becomes payable. Here the wages actually paid are piece-work rates for miles in fact traversed in the working day, governed by the speed of the train, and no one suggests that they are not greater than the contract formula for calculating overtime.

The Court of Claims acknowledges that even as to piece-work rates, § 7(f)(3), Fair Labor Standards Act, 52 Stat. 1063 (1938), 63 Stat. 912 (1949), 29 U.S.C. § 207(f)(3), any agreed contract formula must be "substantially equivalent to the average hourly earnings of the employee", App. 6-7, 490 F.2d at 924; but it holds that that provision, which it apparently recognizes would be conceptually controlling, amended only the F.L.S.A., and does not apply to § 5544.

But nothing is clearer than that this particular amendment only codified existing law. The Supreme Court had several times before then held that true earnings must control even where piece-work is involved.[2]

The most striking instance bears a close resemblance to the system involved here. In Walling v. Harnischfeger Corp., 325 U.S. 427, 65 S.Ct. 1246 (1945), the pay scheme superimposed upon a standard minimum hourly payment certain additional piece-work payments scaled to speed in performance. Under the dual system, too, the miles involved in an assigned run over 100 miles represent the maximum payment, and it is to the interest of the operating worker to cover the distance in the least time. The whole incentive lies in maximizing speed, since extra time does not bring extra pay; but that very fact tends to raise the hourly earnings: the more surely the incentive succeeds in its purpose of reducing the time spent, the more it necessarily increases the hourly earnings. In Harnischfeger, the Supreme Court held that it is those aug-

[2] The Court of Claims commits another odd mistake: "We note that the statute here involved speaks in terms of a 'basic' rate of pay. The word 'basic' not being found in the Fair Labor Standards Act." App. 6, 490 F.2d at 924. Yet the word and the concept appear in the very clause of the F.L.S.A. that the Court cites in its next sentence "(or if a special agreement establishes the *basic rate* for overtime) the rate shall be . . . substantially equivalent to the average hourly earnings . . . over a representative period of time." [Emphasis supplied.] Besides, the Walsh-Healey Act, 49 Stat. 2036 (1936), 56 Stat. 277 (1942), 35 U.S.C. § 35(c), also contains the expression "basic hourly rate received", and the Department of Labor has since 1953 held that this expression means the same as "regular rate" in the F.L.S.A. 41 C.F.R. § 50-201.103 (b); § 42(a)(4), (d)(1), Rules and Interpretations No. 3 (January 31, 1961).

mented hourly earnings which must prevail in establishing the relevant overtime base.[3]

In fact, the Court of Claims misconstrues the meaning of the Belo [§ 203(e)] and § 207(f) "exceptions". In both cases, in order to establish stability in highly irregular situations[4] Congress has permitted the parties to agree respectively on a fixed weekly salary or piecework formula; but in both cases it has demanded that the agreement substantially approximate real earnings. The whole controversy in Belo and in Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 67 S.Ct. 1056 (1947), turned on whether the contracts there involved complied with that requirement. But the requirement remained intact and integral.

In the present case, the contract rates are said by the Court of Claims to control the earnings "for a large

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[3] Harnischfeger resembled the railroad dual system in another significant respect: "And when an incentive worker is temporarily assigned to 'non-incentive' work he is paid at least 20 percent more than his basic hourly rate." 325 U.S. at 429. In the illustrative record before the Court of Claims, the rates "per mile" for railroad operating assignments with a fixed situs (yard and roundhouse work) were for a conductor about 27% higher than for freight road service, and for a brakeman about 21% higher. The fixed-situs rate "per mile" is multiplied by 12½ to produce an unchanging hourly rate. It is obvious that what may be termed the higher productivity of road men (i.e. more *actual* miles traversed in the hour and day) is intended to bring the pay for both into relative equilibrium, with an advantage for the much more arduous road work. The rule approved by the Court of Claims defeats this intention, and would leave road men with much lower wages than yard men.

[4] The courts have held that the irregularity in Belo cases must be as to the hours below 40, and not merely in the overtime hours. Foremost Dairies v. Wirtz, 381 F.2d 653 (5 Cir. 1967), cert. denied sub nom. Home Town Foods v. Wirtz, 390 U.S. 946 (1968).

number of the hours worked". App. 6, 490 F.2d at 924. Here again it is impossible to know the basis for this conclusion, since the case was decided on motion for summary judgment, and petitioner's allegations of fact were to the contrary. In the agreed illustrative record before the Court one plaintiff's road trips as brakeman and conductor (excluding any involving deadheading or the Whittier arbitrary discussed below) averaged 226 miles, which occupied an average of 11.62 hours. The average miles covered in an hour amounted therefore to 19.45. The contract rate is 12.5 miles an hour. The actual average hourly earnings were $5.77 (exclusive of arbitraries); the contract rate would have yielded $3.77 an hour. That is the characteristic difference for roadwork between the real and the hypothetical, and explains why no overtime pay ever accrued under the railroad's interpretation of the statute, which the Court approved.[5]

2. Overtime Based on Actual Earnings Would Not Destroy the Dual System.

Another factor in the Court's ruling was its apprehension, App. 5, 490 F.2d at 923, that the dual system might be destroyed "beyond the possibility of preservation" if overtime were paid on the basis of real earnings. The Court admits that this is only the opinion of intervenors, and it is certainly not based on a record, since the case was decided on motions for summary judgment. The same contention was ad-

[5] Real earnings at $5.77 an hour would under the dual system total $67.15 for the average working day of 11.62 hours without overtime (not counting additional earning from arbitraries). Against this, eight hours at $3.77 yields $30.17, with overtime of 3.62 hours at $5.66 (150% of $3.77) producing $20.48, for a total "statutory" pay of $50.65.

vanced by the railroad in Samples as an argument against paying any overtime at all under § 5544, and was squarely rejected by the same Court, 135 Ct.Cl. at 552. The only aspect that would be affected is overtime; the dual system would continue to control all other aspects of railroad remuneration. Indeed, adoption of petitioner's construction would render the dual-system earnings an indispensable part of the statutory overtime calculation, and bind the two together more closely than ever.

Further, Samples established the rule that dual-system mileage should be compared with earnings on a time basis under the statute. If the parties decided to follow the theory of §203(f), F.L.S.A., supra, and to agree on a realistic contract mileage rate per hour corresponding to the real average earnings, there would be many instances in which, where train speed exceeded the average, the dual-system earnings would continue to exceed the agreed average rate. From inspection of the illustrative record, it appears that this would have been true for 29% of the road trips made by the particular plaintiff in the year studied, employing as the statutory formula actual average straight time earnings of $5.77 an hour and overtime of $8.66. The more efficient (that is, the faster) the operation became, the more dual-system earnings would be likely to prevail over even a realistic statutory formula. This is the sort of comparison the Samples court had in mind, not one that automatically excluded statutory overtime from any practical application.

If on the other hand the suggestion is that correctly calculated overtime represents too much money, as to which there is not the slightest evidence of record, it can

only be replied that this is the consequence of the underlying Congressional intention. Overtime is intended, this Court has said, to cost at least 50% more than the real basic rate of pay. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423-424, 65 S.Ct. 1242, 1244 (1945); Walling v. Helmerich & Payne, 323 U.S. 37, 40, 65 S.Ct. 11, 13 (1944); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-578, 62 S.Ct. 1216, 1220 (1942). Since the extra cost of overtime is an expense that Congress must be deemed to have contemplated in enacting § 5544, and since overtime is controllable by administrative policy, there seems to be no basis—certainly none in the record—for the inference drawn by the Court of Claims.

3. Petitioners Neither Seek Nor Would Receive a Windfall From Correct Overtime.

The Court says that petitioners are "seeking a windfall . . . that would not have befallen them, had the railroad construed the law correctly all along." App. 5, 490 F.2d at 923. Petitioners seek only what *would* have befallen them had the railroad construed the law correctly all along. How this constitutes a windfall the Court of Claims does not explain.

4. Variations in Basic Rate Resulting From the Nature of the Work Do Not Authorize Substituting an Artificial Rate.

The Court seems to find objectionable (although not decisive, apparently) "that under plaintiffs' theory an operating employee's basic hourly rate would be a different figure for every train journey he took." App. 5, 490 F.2d at 923-924. Of course the genius of the dual system is precisely that hourly earnings differ with each journey, simply because train speeds in Alaska cannot be standardized even on identical

itineraries, and differ even more decidedly as between different itineraries. The dual system is in this respect typical of all piece-work and other incentive payment systems. The Supreme Court has repeatedly held that such variations in hourly earnings must be given full effect in the base for calculating overtime. Walling v. Harnischfeger Corp., 325 U.S. 427, 432-3, 65 S.Ct. 1246, 1249 (1945); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460-2, 68 S.Ct. 1186, 1194-5 (1948); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580, 62 S.Ct. 1216, 1221 (1942); Walling v. Belo Corp., 316 U.S. 624, 632, 62 S.Ct. 1223, 1227 (1942).

Moreover, if variableness were a significant factor, and if to contract for a definite overtime formula were deemed to cure the defect, the parties could readily negotiate a formula based on real average earnings experience. The virtue of definiteness does not reside exclusively in an unreal formula that never comes into play.

5. The Samples Decision Did Not Decide the Question Against Petitioners.

The Court mentions the failure of Samples to pass upon the point, which it notices was not squarely presented, and that "it appears" that decision was based on the 12½ mile an hour rate. App. 5, 490 F.2d at 924. It is doubtful that the earlier decision was based on this formula. If the decision did approve "as to that particular, an administrative practice already 11 years old", it was in a much different sense that sustains the contention of the present petitioners. It was then the practice to translate miles travelled into payable hours, for wages were at that time paid on an hourly basis; in all the numerous tables, *actual* miles traversed were divided by 12½ to derive "payable

hours" for wage purposes;[6] obviously the men were thereby paid for *all* the miles they earned.[7] This is very different from the proposition that they shall be paid for only 12½ miles in each payable hour but that there shall be only eight payable hours in the straight-time day. To petitioners it seems that the Samples Court implicity directed continuation of the then existing method of calculation.[8] However, this is admittedly not decisive on either side.

6. The Statutory Duty To Base Overtime on Actual Earnings Is Not Vitiated Because Arbitraries Are Excluded from the Basic Rate.

The Court below seemed to find a fatal inconsistency in the failure of petitioners to "crank" arbitraries into the basic rate. Yet it notes that this would have been clearly contrary to Samples. App. 7, 490 F.2d at 924-925. The Court's original reason for excluding arbitraries was apparently that it understood that they did not "represent hours worked" or were "pay for

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[6] ". . . one hour at an average operating speed of 25 miles per hour appears in the payroll records as two hours or 25 miles paid for." 135 Ct. Cl. at 593; and see tables at 581, 594, 595. The dual system to this day follows the same method in calculating its own limited overtime. In translating miles to time for that purpose, it divides miles actually run by 12½, and pays overtime for hours exceeding the quotient. Although this overtime formula falls short of statutory requirements, it assures the employee of his full basic earnings by paying all actual miles run as straight time.

[7] ". . . the hourly earnings . . . in trains travelling 12½ miles per hour or faster increase as the speed of the train increases." 135 Ct. Cl. at 583.

[8] ". . . the amount earned will be the greater of the amount earned and paid on a mileage basis or the amount *earned* including section 23 overtime . . ." 135 Ct. Cl. at 552. [Emphasis supplied.]

something extra which he did during the time that he was already working and being paid." 135 Ct. Cl. at 551. Petitioners pointed out below that the arbitraries also include compensation for service not otherwise compensated in the mileage system (which pays only for and during actual train movement), such as switching by train crews when yard crews are not provided, or writing train orders at distant stations where the railroad prefers not to station a telegrapher; and also what may be termed job-differential compensation for especially onerous work. Some of these arbitraries ought theoretically, therefore, to be included in the base rate. Others would probably not be includible. And some would be a proper offset against statutory overtime as in themselves essentially constituting overtime pay. However this may be, it is the simple fact, as the Court naturally admits, that it had already totally excluded them in Samples. Nor does it seem at all clear why failure to include the arbitraries in the base rate, whether right or wrong, should render inapplicable the general rule that such base rate must incorporate at least undisputed actual earnings.

B. ARBITRARIES CANNOT LAWFULLY BE SET OFF AGAINST STATUTORY OVERTIME.

The Court of Claims in Samples v. United States declared that arbitrary payments should not be included in calculating the basic rate for overtime; but it also held that except for such as represented overtime, they should not be set off against the statutory overtime. 135 Ct. Cl. at 552. Employees were therefore to retain arbitraries (other than dual-system overtime) in addition to receiving what was due under

§ 5544. The sense of the holding was that dual-system compensation, *with* arbitraries, fails to satisfy statutory overtime requirements.

In the decision under review, the Court of Claims holds that the railroad may command a choice between overtime *without* arbitraries and straight time *with* arbitraries, knowing that this means no overtime will be paid.

The Court says that the arbitraries are not required by statute, and that the railroad may cancel them either unilaterally or by contract. "There is no law cited to us that an employer who concedes the statutory right may not partially recompense himself by curtailing benefits in other areas not prescribed by statute." App. 9, 490 F.2d at 926.[9]

But the defendant railroad did not abolish either the arbitraries or the dual system as a whole. Its managers continued the system. They proceeded to manipulate it to circumvent Samples by making overtime arithmetically impossible. They said, When and only when overtime is otherwise due under the statute, we shall reduce your wages by more than enough to offset it, and you may choose which you will have. The result has been that no overtime has been paid under the statute.

Was Samples then completely delusory? An employer may cut wages, arguendo; but may he entirely defeat the overtime law by arranging that overtime shall never accrue by the simple device that it shall be

[9] The Court even intimates that the question might not be different "If his position had the look or smell of assessment of a penalty for assertion of the right." Id.

more than offset [10] by concomitant cuts elsewhere, which cuts shall be effective only as against overtime?

To allow this is to allow evasion of the overtime laws by the most transparent of devices. Nor is it any answer that the union representative accepted this "to save a system of compensation he thought more advantageous than the statutory system". App. 9, 490 F.2d at 926. Obviously, there was very little choice between accepting the existing system and claiming a delusory overtime compensation that was really a net cut in pay. The Court itself admits that "a pay system that violates the statute is not saved if the employees agree to it." App. 8, 490 F.2d at 925.

The Court says that the only way this set-off of arbitraries "can get into the case" is if they are required to be "cranked into the computation of the basic hourly rate"—which it had previously held they can not be.

It is true that many of the most important arbitraries reported in the record represent payment for actual work not otherwise compensated. For instance, under Rule 6(u) the train crew are required to perform switching work on barges at Whittier, a water terminal; they are paid for this work, normally done by a yard crew, on a time basis using road rates per mile, which are as already mentioned (supra, note 3) about 80% of those paid yard men for the same work. The railroad saves at least this difference through using the train crew, who perform the work during the intervals between arriving at Whittier and departing, that is,

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[10] The government conceded below that "(In other words, thereafter, the arbitraries payment would be off-set against statutory compensation.)" Br. 27.

when they are earning nothing from their road work and would otherwise be idle and without pay. This payment, which is for distinct, otherwise uncompensated work whose value is retained by the railroad, the latter deducts from their pay if statutory overtime accrues.

The Samples Court may have been wrong in saying that this arbitrary is not properly to be included in the overtime base. But can the Anderson Court possibly be right in saying that it may properly be *subtracted* from overtime otherwise payable under the statute?

The Court below failed to understand Samples in relation to parallel problems under other overtime statutes, as codified for instance in § 7(d) of the Fair Labor Standards Act, 29 U.S.C. § 207(d). Many of the arbitraries find direct parallels in that section, which is a compendium of items of remuneration to be excluded from the "regular rate" used to calculate overtime. The principle of their exclusion is that they usually do not represent payment for hours actually worked, and Samples distinctly proceeded on that principle. 135 Ct. Cl at 552.

But there is no suggestion in § 207(d) that the excluded items are to be *set off* against proper overtime, except for payments representing or equivalent to overtime, such as are listed in paragraphs (5)-(7); see § 207(g).[11] That was the whole point of Samples. It also excluded arbitraries from the basic-wage com-

[11] Oddly enough, many of the items excluded from the overtime basic rate by § 207, and also Samples, are *included* in the overtime base under the dual system—and not merely items like the Whittier arbitrary, but even minimum guaranties, deadheading, sick and annual leave.

putation, but it disapproved any set-off against overtime except for dual-system overtime. At 552.

The present decision countenances a total offset by a device that, if lawful, would be effective to nullify every overtime law.

C. THE STATUTE REQUIRES OVERTIME TO BE PAID FOR HOURS OF WORK EXCEEDING 8 IN A DAY AND 40 IN A WEEK.

In its present form, § 5544 says that an employee "is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week." In the case at bar, the Court of Claims sustained a practice of the defendant railroad to pay overtime "on the basis of time in excess of 8 hours in a day or 40 hours in a work week, *whichever is greater.*" App. 11-13, 470 F.2d at 927. The expression "whichever is greater" does not appear either in § 5544 or in any of the other federal overtime statutes, and its validity is agreed to constitute matter of novel impression in litigation.

Drawing on the judicially recognized intention of overtime legislation to discourage exploitation of labor and to spread work, and on the historical development of the relation between daily and weekly overtime provisions, petitioners proposed a construction for giving proper effect to both clauses in § 5544.

The statute requires "overtime time pay for overtime work in excess of 8 hours a day or 40 hours a week." The disjunctive does not give the employer a choice between paying overtime either by the day or week, as may suit him. Nor is the meaning improved by seeming to throw the advantage of the choice to the workman, awarding him the greater of the two (as it were, giving him the choice instead of the employer). Either way,

some hours will be worked at straight time that Congress has designated as overtime. Either reading dilutes the Congressional purpose.

Petitioners therefore contended for a construction that gives effect to both clauses. During the first 40 consecutive hours, overtime is to be paid for hours in excess of 8 a day; after the first 40 hours have been worked, including daily overtime, all further work is overtime. This does not constitute pyramiding of overtime upon overtime; no hour worked receives double overtime, but no hour designated by Congress as overtime fails to be compensated as overtime.

The difference between the two readings is simply that the railroad's rule guarantees the employer 40 straight-time hours, although by consuming the first 40 hours in less than five 8-hour days he has in fact worked his men as many hours fewer of true straight time as he has compressed the 40 hours into days fewer than five. This construction makes him a gift of overtime hours at straight-time pay.

The reading of petitioners precludes that result without giving employees advantages not clearly intended by the law.

The reason of the Court of Claims for rejecting this interpretation seems to arise from a single hypothetical example it deems anomalous, but which, with respect, it has not correctly analyzed. It propounds a case in which a man has worked 42 hours, alternately assuming (a) ten hours on Monday, and eight hours Tuesday through Friday, and (b) eight hours Monday through Thursday, ten hours on Friday. The Court thinks the overtime payments in both instances should be the same two hours, apparently on the theory that an employer is

entitled to 40 hours straight time, and "that it is absurd that the employer should sacrifice his ability to get forty hours work at the regular rate if he calls for overtime at the beginning of the week, but not do so if he calls for it at the end." App. 12, 490 F.2d at 928.

Yet that result is by no means open to the Court's stricture of "whimsical and absurd." Id.

Congress has designated as overtime both the hours after eight in a day and after 40 in a week, and the reason is clear. Such a statute as the Fair Labor Standards Act, which requires overtime pay only after 40 hours, guarantees that much straight time no matter how few the days in which they are compressed. But excessive daily hours may come to constitute an abuse that Congress designs to discourage by the eight-hour clause. That was the case with § 5544, which until 1962 had also been a 40-hour law exclusively, and where the absence of pay for daily overtime was felt as a deficiency despite a nominal prescription of an eight-hour working day. See letter of Secretary of Labor to Senate Committee on Labor and Public Welfare, October 11, 1961, Hearings on S.1304, 87th Cong. 17. The reciprocal shortcoming in a strictly daily overtime scheme was illustrated in the Work Hours Act of 1962 (of which the amendment to § 5544 was a part), which amended numerous such statutes because "present 8-hour laws permit the employment of workers on government construction up to 56 hours a week—seven 8-hour days—without overtime compensation." 108 Cong. Rec. 6684 (April 16, 1962); see also 108 Cong. Rec. 14700 (July 25, 1962).

The addition of the missing piece to previous legislation shows that in each case Congress had clearly in

mind the abuse it was seeking to remedy; and simultaneous amendment in 1962 of statutes some of which lacked the daily and some the weekly feature makes this the more striking.

It must be obvious that in the case of a statute with daily overtime, to pay overtime only after 40 hours would flout the daily provision; and in the case of a statute with a weekly overtime, to pay only for hours over eight in a day would be equally to disregard the weekly requirement.

Yet that is the exact effect of paying only the *greater* of daily or weekly overtime. Whichever is paid, the statutory requirement as to the other is flouted. Whichever is paid, the employer receives a gift of hours that Congress has deliberately designated as overtime.

Although no cases in point have been found, Potlatch Forests Inc. v. Hays, 318 F. Supp. 1368 (D. Ark. 1970), looks clearly in the direction here suggested. Where an Arkansas statute required time and one-half to be paid female employees for work exceeding eight hours a day and 48 hours a week, while the Fair Labor Standards Act required overtime in excess of 40 hours a week, Chief Judge Henley resolved the conflict by holding that since the latter act "requires overtime compensation for all hours in excess of forty worked during a given workweek, regardless of how many hours a day are worked," the State eight-hour provision governed "during the first forty hours of each workweek; after a woman has worked forty hours during a given workweek, the Fair Labor Standards Act simply takes over and the Arkansas statute becomes functus officio." At 1370.

The Court's reasoning is instructive because it deals with an eight-hour law and a 40-hour law in their disarticulated form. The same analysis should be applied to a statute in which the two elements are joined: the eight-hour provision functions until 40 hours have been worked, after which the 40-hour provision governs.

However, the Labor Department has followed a different rule in administering the most natural analogy to § 5544, the Walsh-Healey Act, 49 Stat. 2036 (1936), 56 Stat. 277 (1942), 41 U.S.C. § 35(c), which reads: "That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week", with an exception for employers making agreements with employees pursuant to § 7(b)(1) or (2) of the Fair Labor Standards Act, 29 U.S.C. § 207 (b)(1), (2). The disjunctive here is not ambiguous; neither is to be done except under the proviso and upon the payment of overtime.

The regulation of the Department of Labor effectuating the section reads as follows, 41 C.F.R. § 50-201.103 (c):

> "If in any one week or a part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any one day or *after 40 hours in any one week during which no single daily total of employment may be in excess of 8 hours without the payment of the overtime rate.*" [Emphasis added.]

Words could hardly frame more clearly the rule for which petitioners here contend. Until 40 hours, all daily

time exceeding eight hours must be paid overtime, and all hours above 40 must be paid overtime.

Yet the interpretative bulletin of the Department of Labor construes this provision, which dates back at least to 1953, in the sense incorporated in the railroad's rule. In § 42(c) of its Rulings and Interpretations No. 3 (January 31, 1961), under the Public Contracts Act, the Department quotes § 50-201.103(c), and adds:

> "(2) . . . An employee may not be required to work in the performance of a government contract subject to the Act more than 8 hours in any day, or more than 40 hours in any workweek . . . , without payment of the overtime rate of time and one-half for all hours worked in excess of 8 on any day, or in excess of 40 hours in the workweek, whichever is the greater number of overtime hours. For example, if an employee works 10 hours a day for 6 days in a workweek his hours of work in excess of 8 a day would be 12 for the week; but since he worked a total of 60 hours in the week his hours of work in excess of 40 in the workweek would be 20. He must be paid at the overtime rate for 20 hours."

This interpretation is inconsistent with the rule and the statute.

No published explanation has been found, and in itself it is conclusory and unreasoned, and therefore ordinarily entitled to little judicial respect, compare Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). While the practice that has probably resulted under it exerts a definite force, it has never been tested judicially. In the case illustrated, it treats as straight time eight hours that Congress has declared to be overtime, with consequent direct loss to employees.

D. EXTRA-BOARD OVERTIME IS COMPENSABLE UNDER THE STATUTE.

The Court of Claims denied the claim of extra-board petitioners to overtime pay for standing by after 40 hours. As explained, supra, petitioners are required to stand by for call on 1½-hours notice 24 hours a day, 7 days a week with no rest day; and they are subject to financial and disciplinary penalties for missing calls.

1. There Is No Analogy Between Extra-Board On-Call Status and the Fanciful Leisure Situations From Which the Court Derived Its Ruling.

The Court of Claims erred profoundly in likening the situation of petitioners to the leisure-time activities, drawn from another case, of church and theatre-going, shopping, entertaining and other forms of "recreation, diversion, or relaxation that might suit their fancy." App. 10, 490 F.2d at 926.

The Court admits it denied petitioners opportunity to present evidence from which could have been gathered the real meaning of standing by to await calls on 90-minutes notice for work on a railroad having no fixed freight schedule.

There was, however, proof from which it might have drawn some practical inference even without the full flavor of reality that a live record affords.

The record of one petitioner for the year 1968 was before the Court on the railroad's motion for summary judgment; in the three months from May 27 through August 24 he was on a regular assignment of 4 days in yard work and 2 days on the round trip Anchorage-Healy run; the yard work was scheduled during this

period, but even then the road call varied with every trip. During the rest of the year, the petitioner was called at every hour of the day and night, yard work also assuming the same unpatterned and unpredictable character. He ran the gamut in the two weeks beginning February 4:

On the 5th, 12:01A-8:01A; 6th, 4P-12Mn; 7th, same; 8th, called at 1:30P but not used, recalled at 4:45P-8:15A of the 9th (15'30"); 9th, 7:15P-2:10A of the 10th; 10th, 11:45A-7:30P; 11th (Sunday), 3:15P-3:30A of the 12th (12'15"); 12th, 2P-10P; 13th, not called; 14th, 12:15P-10:25P; 15th, 2:25P-2:15A of the 16th; 16th, 3A-7:05A; 3:05P-12:25A of the 17th.

Surely, the Court could not reasonably infer that the particular petitioner was doing much in the way of leisurely amusement during these two weeks, in which he worked 110 hours and was actually called at 13 different hours for 14 road and yard tours, including such unlikely hours for entertainment as 4P, 4:45P, 7:15P, 8:30P, midnight and 3A.

It is this clear proof that the railroad means what it says when it demands readiness for possible calls 24 hours a day, 7 days a week with no rest day, which renders inappropriate the analogy the Court of Claims drew from other situations in which there apparently was evidence of the use the plaintiffs there made of their on-call time. Skidmore v. Swift said that whether waiting time is work time "is a question of fact to be resolved by appropriate findings of the trial court." 323 U.S. 134, 136, 65 S.Ct. 161, 163 (1944). Here the Court of Claims declined to hear evidence, or to evaluate what was before it.

2. Petitioners were Engaged To Wait Within the Meaning of Skidmore & Swift.

Skidmore & Swift also laid down that the relevant factual evidence related to whether "the employee was engaged to wait, or . . . waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself." 323 U.S. 134, 137, 65 S.Ct. 161, 163. The Court of Claims infers from two circumstances that here the compensation was intended to cover waiting as well as task, and therefore that petitioners were waiting to be engaged: (a) that they draw no pay for waiting when they work more than 1200 miles; (b) the compensation below 1200 miles is "just another arbitrary" like "several other arbitraries that deal with waiting situations." App. 10, 49 F.2d at 927.

a. The inference from failure to pay above 1200 miles is circular.

With respect, it does not seem that the propriety of not paying after 40 hours can fairly be deduced from the very fact of nonpayment. That is the issue in the case, not the answer.

Moreover, the guaranty of 1200 miles is at the rate of 100 miles a day, and therefore for six days in each week, already beyond the 40-hour statutory limit after which overtime accrues.

b. The assimilation to other waiting-time arbitraries proves that the dual system in principle pays separately for waiting time.

The Court's assimilation of the extra-board guaranty to other allowances for waiting time in the dual system, far from undermining, establishes the contention of petitioners that they are paid to wait. It shows conclusively the intention to pay for such time in many

aspects of railroad operation. Under some circumstances, in fact, waiting time (like other nonworking time) enters into the computation of dual-system overtime. Supra, footnote 11.

The Court below is not justified in proceeding from the circumstance that it has excluded these allowances from the ordinary statutory overtime computation as nonworking time to the conclusion that they do not reflect the contractual intention to pay for waiting time as working time—which is the critical condition in the overtime provision of § 5544 that deals with on-call time. The statutory distinction is clear: Stand-by or on-call time may not qualify for ordinary working overtime, but it does qualify for its own form of overtime (after 40 hours) if separately compensated.

Here the Court's own reasoning establishes the statutory predicate.

CONCLUSION

Wherefore petitioners respectfully pray that a writ of certiorari should issue to review the decision of the Court of Claims.

JOSEPH A. KLAUSNER
RAY R. MURDOCK
CLYDE C. HOUSTON

Attorneys for Petitioners